

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Applications of)	
)	
POWELL MEREDITH COMMUNICATIONS)	File No. BNP-20000128ACC
COMPANY)	Facility ID No. 122509
)	
For a Construction Permit for a New AM Station)	
at Las Vegas, Nevada)	
)	
VICTOR A. MICHAEL)	File No. BNP-20000201AEM
)	Facility ID No. 122459
For a Construction Permit for a New AM Station)	
at Cheyenne, Wyoming)	
)	
ALVIN LOU MEDIA, INC.)	File No. BNP-20000201ADR
)	Facility ID No. 122419
For a Construction Permit for a New AM Station)	
at Spring Valley, Nevada)	

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 2004

Released: June 30, 2004

By the Commission:

1. Alvin Lou Media, Inc. ("ALM") seeks review of a decision by the Media Bureau ("Bureau"), dated August 15, 2002 ("Reconsideration Decision").¹ For the reasons discussed below, we deny the application for review.²

2. **Background.** ALM, Powell Meredith Communications Company ("PMCC"), and Michael filed applications for new AM broadcast stations during the filing window for AM Broadcast Auction No. 32.³ ALM filed for a new AM station at Spring Valley, Nevada; PMCC filed for a new AM station at Las Vegas, Nevada; and Michael filed for a new AM station at Cheyenne, Wyoming. ALM and PMCC's applications were mutually exclusive ("MX") with each other, and PMCC's proposal was

¹ Letter to Mr. Dave Garey, Lee J. Peltzman, Esq., and A. Wray Fitch, III, Esq., Ref. No. 1800B3-TSN (MB Aug. 15, 2002).

² ALM's Application for Review was dated September 14, 2002. Victor A. Michael ("Michael") filed an Application for Review dated September 19, 2002. PMCC filed a Consolidated Opposition dated October 2, 2002, and a Supplement to Consolidated Opposition dated October 7, 2002. Michael filed a Voluntary Request for Dismissal of Pending Application for Review on January 29, 2004. Accordingly, we dismiss Michael's Application for Review and consider only ALM's Application for Review, although ALM raises the same issue regarding grantability of the Powell Meredith application as did Michael.

³ See Public Notice, "AM Auction Filing Window and Application Freeze," 14 FCC Rcd 19490 (MMB/WTB 1999).

mutually exclusive with Michael's Cheyenne proposal. Accordingly, the three applications were designated MX Group AM 38.⁴ Grant of a broadcast application for a new AM facility generally is determined by competitive bidding procedures.⁵ However, in the *Broadcast First Report and Order*, the Commission determined that the broadcast competitive bidding procedures should be consistent with its statutory mandate under Section 307(b) of the Communications Act of 1934 ("Section 307(b)") to provide a "fair, efficient, and equitable" distribution of radio services across the nation.⁶ Pursuant to our AM broadcast auction procedures, the Bureau directed that applicants in MX Group AM 38 file amendments to their applications addressing the respective merits of their applications under Section 307(b).⁷ The Bureau proceeded to make the required threshold determination under Section 307(b), using the Commission's established priorities for such determinations.⁸

3. In its April 11, 2002, decision ("Staff Decision"), the Bureau determined that ALM's Spring Valley proposal was not entitled to preference as a first local transmission service under Priority (3) of the *FM Assignment Policies*. Spring Valley is located within the Las Vegas Urbanized Area, and ALM's proposal would place a principal community signal over more than 50 percent of the Las Vegas Urbanized Area.⁹ Moreover, any differences in areas and populations to be served between the ALM and PMCC proposals were *de minimis*. Thus, both were considered to be applications to serve the Las Vegas Urbanized Area. ALM and PMCC's Las Vegas area proposals would serve significantly greater areas and populations than Michael's Cheyenne proposal, and thus the Bureau found that Las Vegas was entitled to a dispositive Section 307(b) preference over Cheyenne. Accordingly, the Bureau directed that ALM's and PMCC's applications proceed to auction, pursuant to the Commission's direction that "if no Section 307(b) determination is dispositive (or if more than one application remains for the community with the greater need), the applicants must then be included in a subsequently scheduled auction."¹⁰

⁴ See *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction," 15 FCC Rcd 20449, 20453, 20455 (MMB 2000) ("*Mutually Exclusive Public Notice*").

⁵ See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses* ("*Broadcast First Report and Order*"), 13 FCC Rcd 15920 (1998); *recon denied*, 14 FCC Rcd 8724 (1999); *modified*, 14 FCC Rcd 12541 (1999).

⁶ 47 U.S.C. § 307(b).

⁷ See *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451-52; *Letter to Dave Garey, Secretary, Alvin Lou Media, Inc., et al.*, Ref. No. 1800B3-TSN (MMB Oct. 22, 2001) ("October Section 307(b) Request"). The October Section 307(b) Request bore OMB Control No. 3060-0996.

⁸ See *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982) ("*FM Assignment Policies*"). Those priorities are: (1) provision of first fulltime aural service; (2) provision of second fulltime aural service; (3) provision of first local transmission service; and (4) other public interest matters, with co-equal weight being given to Priorities (2) and (3). *Id.* at 91. The priorities set forth in *FM Assignment Policies* are also used in evaluating applicants for new AM stations. *Alessandro Broadcasting Co.*, 99 F.C.C.2d 1 (Rev. Bd. 1984). The Bureau specifically stated that the *FM Assignment Policies* would be applied in AM Auction No. 32. *Mutually Exclusive Public Notice*, *supra* note 4, 15 FCC Rcd at 20451.

⁹ See *Darien, Rincon, and Statesboro, Georgia; Screven, Rincon, and Statesboro, Georgia and Palatka and Middleburg, Florida*, 17 FCC Rcd 20485, 20486 (MMB 2002) (showing under *Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374, 5377-79 (1988), is required when a station located outside an urbanized area proposes to place a principal community signal over 50 percent or more of the urbanized area).

¹⁰ *Broadcast First Report and Order*, 13 FCC Rcd at 15965. The Bureau further stated that Michael's auction filing window application would be dismissed upon award of a construction permit to ALM or PMCC. Staff Decision at 4.

4. ALM and Michael petitioned the Bureau for reconsideration of the Staff Decision, and ALM additionally requested stay of the auction. Both parties argued that PMCC's application was technically deficient and could not be granted, and that therefore it should be dismissed and PMCC not allowed to participate at auction. The staff rejected this argument, noting that under the Commission's broadcast auction procedures, technical data are submitted with AM auction filing window applications solely to enable a mutual exclusivity determination.¹¹ The staff also rejected ALM's motion to stay the auction pending resolution of its allegations regarding the PMCC application, finding ALM had not addressed the factors necessary to grant a stay and noting, in particular, that it had not shown it would likely prevail on the merits. The Bureau denied reconsideration, and the ALM and PMCC applications proceeded to auction, which commenced December 10, 2002, and was completed December 12, 2002.¹² ALM was determined not qualified to bid at auction because it did not make a timely upfront payment.¹³ PMCC was the winning bidder at auction for the AM broadcast construction permit at Las Vegas, Nevada, in MX Group AM 38.¹⁴

5. **Discussion.** *Allegations regarding grantability of PMCC application:* ALM reiterates its previous assertions that the PMCC application cannot be granted due to technical defects. Specifically, ALM argues that PMCC's auction filing window application does not satisfy the AM daytime and nighttime interference protection requirements of Sections 73.37 and 73.182 of our rules.¹⁵ Thus, it contends, PMCC's application should be dismissed, and ALM's and Michael's applications processed as non-mutually exclusive applications. However, the contentions regarding the alleged technical deficiencies of PMCC's application, based on PMCC's AM auction filing window application, are beyond the scope of a threshold Section 307(b) analysis, and thus have no relevance to the Bureau's determination.¹⁶ ALM does not so much challenge the Bureau's Section 307(b) methodology as the fact that PMCC's auction filing window application was considered at all. Ultimately, ALM raises a question of acceptability of the PMCC AM auction filing window application, a determination that the Commission has stated it will not undertake prior to auction.¹⁷

6. The issue of pre-auction determination of application acceptability and grantability was considered and discussed when the Commission established its broadcast auction procedures. The Commission tentatively concluded that limiting pre-auction analysis of all filed applications to a determination of mutual exclusivity "would save considerable Commission resources," although it

¹¹ *Id.* at 15975, 15976 n.159.

¹² *Public Notice*, "New AM Broadcast Stations Auction Closes," 17 FCC Rcd 25122 (WTB/MB 2002) ("*Auction 32 Closing Public Notice*").

¹³ 47 C.F.R. § 1.2106(c) (applicant not submitting at least the minimum upfront payment will be ineligible to bid and its application dismissed). See *Public Notice*, "Auction of Construction Permits for New AM Broadcast Stations – 5 Qualified Bidders," 17 FCC Rcd 23665, 23675 (MB/WTB 2002) (ALM listed as non-qualified bidder).

¹⁴ *Auction 32 Closing Public Notice* at 25129. PMCC submitted a gross bid equal to its upfront payment of \$50,000. Because it claimed a 25 percent new entrant bidding credit, PMCC's net winning bid was \$37,500. PMCC timely filed its complete Form 301 long form application January 17, 2003 (File No. BNP-20030117AAB).

¹⁵ 47 C.F.R. §§ 73.37, 73.182. See, e.g., Michael Application for Review at 2.

¹⁶ In addition to filing FCC Form 175, Application to Participate in an FCC Auction, applicants were also required to file Section I and Section III-A (Tech Box) of FCC Form 301, Application for Construction Permit.

¹⁷ We therefore take no position on the merits of the Section 307(b) determination.

recognized that such an approach might result in “applicants, whose technical proposals are unacceptable, participating and perhaps prevailing in an auction.”¹⁸ An alternate approach was proposed that would involve pre-auction processing of submitted technical data, although such a procedure could slow the auction process. However, after receiving comments, the Commission adopted its initial processing proposal:

In keeping with the Commission’s efforts to “reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the initiation of service, and encourage applicants to participate in the process,” (citation omitted), we will not make any determination as to the acceptability or grantability of an applicant’s technical proposal prior to the auction. Deferring technical review until the post-auction submission of long-form applications by the winning bidders will minimize the potential for delay and will promote the deployment of new broadcasting service to the public as expeditiously as possible, in keeping with our statutory objective.¹⁹

7. Our broadcast auction procedures provide ample opportunity for parties to challenge the legal and technical qualifications of an applicant in a post-auction petition to deny, and winning bidders whose long-form applications cannot be granted for legal or technical reasons are subject to penalties, including default payments.²⁰ Accordingly, such a challenge at this stage of the proceeding is misplaced. We find, therefore, that the Bureau acted correctly in considering PMCC’s application, and subsequent materials submitted by PMCC, in making its Section 307(b) determination with regard to MX Group AM 38. Because ALM does not challenge the manner in which the Bureau applied *FM Assignment Policies* and precedent in its Section 307(b) analysis, ALM’s application for review is denied.²¹

8. *Request for Stay*: ALM contests the Bureau’s finding that it did not make the required showing for a stay of the auction in MX Group AM 38.²² However, the Bureau stated in the Reconsideration Decision that, “[a]s we have already found that ALM does not prevail upon the merits,

¹⁸ *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, 12 FCC Rcd 22363, 22391 (1997).

¹⁹ *Broadcast First Report and Order*, 13 FCC Rcd at 15979. The “statutory objective” referenced in the quoted passage is that found in 47 U.S.C. § 307(j)(3)(A).

²⁰ 47 C.F.R. §§ 1.2109(c) (winning auction bidder who is found unqualified or who defaults on auction payments is liable for default penalties set forth in Section 1.2104(g)(2)), 1.2104(g)(2) (defaulting or disqualified bidder must pay difference between its winning bid and subsequent high bid for permit or license, plus three percent of its winning bid amount or the subsequent winning bid amount, whichever is less), 73.5006 (petitions to deny may be filed against winning broadcast auction bidder’s long-form application). *See also Broadcast First Report and Order*, 13 FCC Rcd at 15979.

²¹ ALM devotes a substantial portion of its application for review to various arguments, as well as non-dispositive tangential issues, which hinge upon a finding that PMCC’s proposal was technically ungrantable. We need not address these arguments, as we have already found that the Bureau acted properly with regard to its consideration of PMCC’s application.

²² In order to obtain a stay, a party must show (1) that it is likely to prevail upon the merits; (2) that it will suffer irreparable harm absent a stay; (3) that interested parties will not be harmed if a stay is granted; and (4) that the public interest favors grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

we need not inquire into the other factors necessary for grant of a stay.”²³ Because we agree that ALM has wholly failed to demonstrate a likelihood of prevailing on the merits, we find no error in the Bureau’s holding.

9. In its Application for Review, ALM attempts again to make a showing in support of its request for stay. However, not only does ALM fail to show that it is likely to prevail on the merits, but its stay request is procedurally flawed. Section 1.44(e) of our rules provides that “[a]ny request to stay the effectiveness of any decision or order of the Commission *shall* be filed as a separate pleading. Any such request which is not filed as a separate pleading *will not be considered by the Commission*.”²⁴ For these reasons, we need not consider ALM’s stay request further.

10. **Conclusion.** For the foregoing reasons, ALM’s Application for Review IS DENIED. Michael’s Voluntary Request for Dismissal of Pending Application for Review IS GRANTED, and Michael’s Application for Review IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²³ Reconsideration Decision at 4. See, e.g., *Global Broadcasting Group, Inc.*, 8 FCC Rcd 158 (1992); *Mobilfone Service, Inc.*, 69 F.C.C.2d 198, 199 (1978); *RKO General, Inc. (WNAC-TV)*, 59 F.C.C.2d 1105, 1106 (1976).

²⁴ 47 C.F.R. § 1.44(e) (emphasis added). See also *Pentecostal Revival Association, Inc.*, 2 FCC Rcd 6068 n.1 (1987).